

**295.1080**  
11/22/78

## DECISION AND RECOMMENDATION

(2) CLD 209 contravenes the decision of the Board of Equalization in --- and ---.

## Summary of Petition

Petitioner is a corporation engaged in business as a radio station ---. A prior audit covered through December 31, 1972.

In the radio broadcasting industry, merchandise and sometimes cash is exchanged for air time. This is known as a "trade deal". As a general rule, the dollar value of air time may be two, four, or five times the value of the merchandise exchanged. Radio stations that are successful in selling all air time do not make "trade deals". Stations that have unsold air time, which will be lost forever if not sold for some price, resort to "trade deals" as an incentive. As the seller of the merchandise considers the merchandise to be traded for air time of a specific dollar value, the dollar value of the air time appears on the invoice or memo which the seller issues to the radio station for the merchandise. In fact, in cases such as we have here, the dollar value of the air time is the only amount which appears on the invoice or memo and was used by the auditor as the measure of the use tax in question. The merchandise is used by the radio station by giving it away as prizes or otherwise consuming it.

As here, the dollar value of air time was used as the measure of tax in a 1967 audit of ---. The determination resulting from the audit was petitioned. The Board heard the petition at an oral hearing in Sacramento on July 1, 1968 (see Board summary, Exhibit F to brief). The Board staff argued that the stated dollar value of the air time was the proper measure of tax, citing Section 6011 of the Revenue and Taxation Code and Hawley v. Johnson, 58 Cal. App. 2d 232. -- argued that the retail value of the merchandise was the proper measure of tax; that the stated value of air time was only an incentive; that the air time involved was unsold fringe spots which were not salable at the usual price; and that this was therefore not a Hawley case.

The Board cancelled the tax. As Mr. Warner recalls, the Board was particularly impressed by one "trade deal" for cash in which --- received air time in the stated value of \$200,000 for a payment of \$50,000. As part of its decision, the Board instructed its staff, Mr. --- of the --- and Mr. Warner to meet and agree as to implementing the Board's order.

On October 29, 1968, the parties met as directed by the Board but nothing definite was decided. There was then an extensive exchange of correspondence (Exhibits G through DD to brief) which included comments on CLDs 209 and 219 (Exhibits Land T) which were not published in the tax services because of questions raised by Messrs. Warner and ---. The last correspondence we are aware of is Mr. Warner's letter of October 25, 1971 (Exhibits CC and DD) with which he submitted a copy of a "trade deal" contract. Evidently at that point both parties lost track of the matter.

Until the audit of Petitioner in 1977, the --- believed the matter concluded on the basis of the Board decision of July 1, 1968. This audit's use of the dollar value of air time as the measure of tax, of course, revived the issue.

## Analysis and Conclusions

The tax determination against Petitioner is once again the Hawley case as applied to "trade deals". The only evidence of the agreements of the parties are the invoice and memos from the sellers of merchandise and the only amounts stated therein are the dollar values of the air

time. The audit staff rejects Petitioner having the right to substitute the fair market value of the merchandise for: the stated values of air time.

But, as is well documented by Mr. Warner, the staff submitted this result to the Board for approval at the hearing in 1968. The first question here is what did the Board decide. Petitioner's position is that the Board decided that the fair market value of the merchandise was the measure of tax, not only for the audited periods then at hearing (1/1/64 to 3/31/67), but also for the future. The audit staff's position is that the Board decided that fair market value was the measure of tax for past periods, but that for future periods the rule of the Hawley case would apply. What then did the Board decide?

While neither party submitted a copy of the actual Board decision, we have obtained a copy and attach and incorporate it herein. The Board's order reads:

"The Board concluded that prior to March 1, 1969, the proper measure of use tax with respect to merchandise sold by out-of-state retailers to the petitioner in exchange for radio time is the fair market value of the merchandise. However, as to contracts entered into on or before March 1, 1969, the measure of the use tax with respect to such merchandise will be the value attributed to the merchandise in the contract of sale."

The first problem with the Board's order is the word "before" in the second sentence. The use of "before" makes no sense. It seems to make both measures of tax applicable to the pre-March 1, 1969 period. Of course, the audit staff would see "before" as an obvious typographical error and contend that the order only makes sense if "after" is substituted for "before".

But even making this substitution, the order must be read in the light of the oral directions the Board gave on July 1, 1968 that the parties meet and discuss how to implement its order. Within the language of the Board's order, the reason for such meeting was obviously to define what would be accepted as "...the value attributed to the merchandise in the contract of sale". This phrase is ambiguous in the context of contracts of sale which are oral and, at best, are only evidenced by invoices or memos issued by one of the parties to the sale. The ambiguity is apparent again in the petition now before us.

The Board believed that its staff and the --- representatives --- would meet and resolve the ambiguity. While extensive attempts at resolution were made, our reading of what happened is that an impasse was reached and, under the press of current work, the matter lapsed and was never resolved.

Given these facts, we believe that the Board's instructions were never implemented. We cannot assume what the Board would have done if the impasse had been brought back before them in 1969. We are convinced, just from the form of the Board's order and the accompanying oral directive to the parties, that the Board did not intend that the fair market value of the merchandise would remain the measure of tax for future periods without further action by anyone. If that were the case, why would the Board direct the parties to hold further meetings and why different descriptions of the measure of tax in the two sentences in its order. The obvious intention of the Board was that fair market value of the merchandise was the tax measure for past periods and that the parties would meet and agree as to how that same measure could be shown in the "... contract of sale" so that it would be the measure in the future.

As the parties never agreed, and as the Board staff never finally stated to the --- that the dollar value of air time would be taxed if no other amount appeared on the documents evidencing the contract, we do not believe the determination against Petitioner can stand. There is sufficient evidence that members of the --- relied on the --- decision to once again decide that, for past periods, the measure of tax should be the fair market value of the merchandise.

But that only once again brings us to what we read as an impasse as to the measure of tax for future periods. We see nothing to be gained by a renewal of correspondence. This hearing officer believes this is a Hawley case; that the Board's order intended that, for future periods, --- members must agree to a method of contracting and/or invoicing that would satisfy Hawley; and that, if agreement could not be reached to alter the contracts and/or invoices, the measure of tax would be the stated value of the air time.

Therefore, in the absence of a Board decision on this petition to the contrary, Petitioner and --- membership (through Mr. --- are on notice that, effective January 1, 1979, the value of the air time stated will be the measure of tax when the trade agreements (either written contracts or invoices) do not state the value attributed to the merchandise.

#### Recommendation

Reaudit. Reduce the measure of tax for trade deals to the fair market value of the merchandise exchanged. Redetermine as adjusted. District to make adjustment.

\_\_\_\_\_  
Donald J. Hennessy, Hearing Officer

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Nov. 6, 1978  
Date

Reviewed Far Audit

\_\_\_\_\_  
Principal Tax Auditor

\_\_\_\_\_  
Nov. 13, 1978  
Date

State Board of Equalization  
Department of Business Taxes  
P. O. Box 1799          Sacramento, California 95808

Date: June 20, 1969

REDETERMINATION	Measure of tax	AMOUNT			
		Tax	Interest	Penalty	Total
As Determined 1/1/64 – 3/31/67		1,343.28	85.51	134.33	1,563.12
Adjustment		-534.24	56.41	-53.43	-531.26
As Redetermined		809.04	141.92	80.90	1,031.86
Less Payment 5/29/69		809.04	141.92	80.90	1,031.86

Paid in Full

The Board concluded that prior to March 1, 1969, the proper measure of use tax with respect to merchandise sold by out-of-state retailers to the petitioner in exchange for radio time is the fair market value of the merchandise. However, as to contracts entered into on or before March 1, 1969, the measure of the use tax with respect to such merchandise will be the value attributed to the merchandise in the contract of sale.

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